SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1996

THORN Americas, Inc., (formerly known as Rent-A-Center, Inc.), a Kansas corporation, and THORN EMI North America Holdings, Inc., a Delaware corporation,

Petitioners,

vs.

Vickie Fogie, Joan Leonard and Angela Adams, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

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I. WHETHER THE RULE ARTICULATED IN *BOUIE* SHOULD BE APPLIED TO THE RADICAL AND UNFORESEEABLE EXPANSION OF A CIVIL STATUTE, PENAL IN NATURE, IS AN IMPORTANT QUESTION SQUARELY PRESENTED HERE

Respondents do not take issue with the importance of the due process principles enunciated in *Bouie v. City of Columbia*, 378 U.S. 347 (1964); nor do respondents challenge the importance of a clear determination by this Court that the principles of *Bouie* should be applied when serious penalties are implicated, even if they are civil. Instead, in complete disregard of the actual language of the statutes that governed THORN America's rental-purchase agreements, respondents dwell almost entirely on the supposed "notice" petitioners had of the radical change in the law worked by the *Colortyme/Fogie* decision. As this Court ruled in *Bouie*, however, the determination of whether fair warning existed "must be made on the basis of the statute itself," 378 U.S. at 355 n.5, not on snippets from legislative history, proposed legislation never enacted, or opinions offered years before the most relevant law was passed.

Prior to the *Colortyme/Fogie* decision, the statutes at issue did not give any clue that they would be extended to apply to rent-to-own transactions. Whatever discussions took place in or outside of the legislative halls, the first irreducible fact is that the terms of the strictly construed usury law required, among other elements, (1) that a debt be incurred and, (2) that there be an agreement that the principal shall be repayable absolutely. *See, e.g., Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn.

1974). The second irreducible fact was stated by the Minnesota Supreme Court itself in *Colortyme/Fogie*: "rent-to-own consumers technically do not incur any debt . . . [and] a rent-to-own consumer technically has no absolute obligation to repay a principal amount." Pet. App. at 55. Thus, prior to *Colortyme/Fogie*, absolutely no warning existed that the usury statute, as it then existed, applied to rent-to-own agreements.

The Minnesota Supreme Court's construction of the usury statute when read with the Credit Sales Act was also completely unexpected. After noting that there was "technically" no credit granted, the Minnesota Supreme Court nonetheless gave the term "credit" a "liberal construction" for purposes of the Credit Sales Act, because that act was a "remedial statute." *Id.* at 52-53. That construction was novel. What followed was nothing less than radical: The newly devised, liberal definition of credit was then used to eliminate two of the elements of usury, even though it was well-established law in Minnesota that the usury statute was regarded as "penal in nature," and, as such, its terms were to be given a *strict* construction, not a liberal one. *See, e.g., Walter E. Heller & Co. v. Warner*, 163 N.W.2d 573, 577-78 (Minn. 1968); Pet. at 6. There was no warning, prior to *Colortyme/Fogie*, that a liberal construction would be placed on the term "credit" as used in the Credit Sales Act, which would then be extended to eliminate "by operation of statute" two of the four elements of the strictly construed usury law. No prior decision of the state supreme court warned that this construction might occur, and respondents point to none.

Indeed, the unforeseeablity of the usury statute applying to rent-to-own transactions is highlighted

throughout respondents' brief. Each time respondents state that the rent-to-own agreements constituted a credit sale, they cite to only one case – the *Colortyme/Fogie* decision itself. They cite to only one case because before *Colortyme/Fogie* no Minnesota court had ever construed the rent-to-own agreements as a credit sale. Similarly, attempting to make it appear as if the plain language of the Credit Sales Act had patently included all rent-to-own agreements before *Colortyme/Fogie*, respondents baldly state that all such agreements were "defined by Minnesota statutes as credit sales." Br. in Opp. at 2. Once again, however, their cite to authority is only to the statute as "interpreted" in the *Colortyme/Fogie* decision. *See id.* Prior to *Colortyme/Fogie*, a rent-to-own agreement was only a credit sale covered by the Credit Sales Act if it also involved the actual granting of credit – such as when a rent-to-own customer borrowed money to make his or her payments. Pet. App. at 84. Petitioners had no notice that a court was going to disregard the clear "credit" requirement and then eliminate two of the elements of the strictly construed usury statute.

Respondents' reliance on legislative "history" as notice is legally insufficient under the standard set out in *Bouie*. It is also misleading: the relevant legislative history would be that of the usury statute, but tellingly respondents are silent in that regard.[1] Moreover, even if the

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[1] Even accurately referenced legislative history would prove little here. As Justice Scalia has observed in a concurring opinion, "the law is what it says: we should content ourselves with reading it rather than psychoanalyzing those who enacted it." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S. Ct. 637, 645 (1996). Here, as set forth above the statutes are mute as

Court were to consider legislative history, nothing in the legislative history of the Credit Sales Act, from which respondents do selectively quote, even hints that any liberal definition of credit under the Credit Sales Act would be extended to the usury statute, let alone then applied to already completed transactions.

Nor did any prospectus or legal information packet create notice that this radical change in the law was foreseeable. At the time of the prospectus and the legal information packet, Rent-A-Center was not even doing business in Minnesota. Not surprisingly, before Rent-A-Center commenced business in Minnesota, its franchisee's counsel unequivocally opined that the Credit Sales Act *did not* apply to the rent-to-own agreements. Moreover, respondents completely ignore one critical issue: namely, what role the comprehensive Rental-Purchase Agreement Act ("Rental-Purchase Act") enacted in

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to their application to rent-to-own transactions. In addition, legislative history is simply not reliable. As Judge Kozinski of the United States Court of Appeals for the Ninth Circuit has warned:

> The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is. The propensity of judges to look past statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process. The potential for abuse is great.

Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1987) (en banc) (Kozinski, J, concurring). The fact that certain provisions of a statute were not enacted is unimportant; what is important are the statutes that emerged from the legislative deliberations.

1990 was meant to serve if a 1981 amendment to the Credit Sales Act had already rendered it a nullity. Petitioners' full compliance with the Rental-Purchase Act made the radical change in the law even more shocking.

The state court can, of course, make radical and unforeseeable "interpretations" of state law. It is the federal court's retroactive application of those changes in the law that violated fundamental concepts of due process here. Although the court of appeals acknowledged the existence of *Bouie*, it failed to actually apply *Bouie* to this case; the court of appeals' holding is that the important due process principles underlying *Bouie* do not operate to prevent what happened here. As this Court recently stated, however, "the presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen." *Lynce v. Mathis*, No. 95-7452, 1997 WL 65582 at *2 (U.S. Feb. 19, 1997). This Court should take this opportunity to decide that the *Bouie* standard should be applied in a case such as this, where a retroactively applied, unexpected and unforeseeable change in state law, penal in nature, has virtually eliminated an entire industry.

II. WHETHER A MORE THAN MERELY "TOLERANT" TEST FOR VAGUENESS MUST BE APPLIED WHEN THE SANCTIONS FOR VIOLATION OF THE LAW BEING TESTED ARE PENAL IN NATURE IS ALSO A QUESTION SQUARELY PRESENTED FOR REVIEW BY THIS CASE.

Even if, as respondents argue, the principles of *Bouie* were not implicated here because the state supreme court merely "interpreted" the law and did not unexpectedly

change it, then the second question presented by the Petition would come to the fore: Where severe remedies, civil in name but penal in nature, will be the sure result if a law is interpreted to apply, is a merely "tolerant" test for vagueness sufficient to guard against the application of that law without the fair notice required by due process?

Respondents' answer to this question is one of avoidance. Even though petitioners expressly stated in the Petition that "[t]he vagueness at issue is not with the law as it existed following the new 'interpretation' by the state supreme court," Pet. at 23, respondents' primary response is to argue that "the state court's interpretation of these statutes cannot somehow render the statutes unconstitutionally vague." Br. in Opp. at 21.

The real problem here, with which respondents do not deal, is what this Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), recognized as the vagueness problem posed by a statute – or here, a combination of statutes – that is "a trap for the wary as well as the unwary."[2] Here, as was similarly true in *Gentile*, careful study of the possibly relevant statutes – the usury law, the Credit Sales Act, and the Rental-Purchase Act – yielded the conclusion that the usury law did not apply

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[2] *Gentile*, 501 U.S. at 1051 ("The fact that Gentile was found in violation of the Rules after studying them and making a conscious effort at compliance demonstrates that Rule 177 creates a trap for the wary as well as the unwary."). Respondents do not even acknowledge *Gentile*, much less distinguish the issue addressed there from the one presented by this case.

to transactions that did not involve the extension of credit, and rental-purchase agreements such as those utilized by petitioners did not involve the required credit. These conclusions of the "wary" were borne out by the Minnesota courts: The Minnesota Supreme Court in *Colortyme/Fogie* itself expressly acknowledged that the transactions at issue did not "technically" involve the extension of credit,[3] and the Minnesota Court of Appeals had previously expressly concluded that the usury laws did not apply to these transactions because they did not involve the extension of credit. *Miller v. Colortyme, Inc.*, 504 N.W.2d 258, 260 (Minn. Ct. App. 1993). What the law "technically" requires is, of course, what the "wary" would look for, and here there was a "safe harbor": if no credit was extended, then the usury law did not apply. It was only after the Minnesota Supreme Court "interpreted" the usury law to apply not just to terminable leases that really did involve credit, but even to transactions that did not "technically" involve credit that both the wary and the unwary found out that what the clear words of the statutes meant "technically" was not what they meant "legally." The economic incentive to be wary thus did not obviate the vagueness problem, and the court of appeals' economic justification for applying a "more tolerant" vagueness test thus was disproved by the record here.

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[3] *See, e.g.*, Pet. App. at 55 ("We agree . . . that rent-to-own consumers technically do not incur any debt. . . . We also agree . . . that a rent-to-own consumer technically has no absolute obligation to repay a principal amount.").

Respondents also attempt to avoid the impact of the vagueness question by noting that there was nothing uncertain about the nature of the "remedies" that would apply to violations of the usury statute. *See* Br. in Opp. at 22. It was indeed certain that if the usury law applied, draconian remedies, long declared by the state courts themselves to be "penal in nature," *see, e.g., United Realty Trust v. Property Dev. & Research Co.*, 269 N.W.2d 737, 742 (Minn. 1978), would be imposed. The vagueness problem articulated in the Petition and reiterated above, however, lies in divining how a reasonably prudent person was to know those laws would be applied in the first place when, "technically," they did not apply. Indeed, it is because of the certainty of the application of those "penal" remedies that the court of appeals should have recognized that, especially in light of the concerns this Court articulated in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), a *more* strict and *less* tolerant test for vagueness should have been applied. The question of the appropriate standard to use for a vagueness challenge when civil penalties are the certain consequence of a statute's application is thus squarely presented for this Court by this case, and fully merits this Court's review.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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